

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86 Orig.

TITLE LOUISIANA, Plaintiff v. MISSISSIPPI, ET AL.

PLACE Washington, D. C.

DATE January 16, 1984

PAGES 1 thru 46



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1	<u>C O N T E N T S</u>	
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3		
4	J. I. PALMER, JR., ESQ.,	3
5	on behalf of the Plaintiff	
6		
7	DAVID C. KIMMEL, ESQ.,	25
8	on behalf of the Defendants	
9		
10	J. I. PALMER, JR., ESQ.,	41
11	on behalf of the Plaintiff - rebuttal	
12	- - -	
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We'll hear arguments
3 first this morning in 86 Original, Louisiana against
4 Mississippi and others. Mr. Palmer, you may proceed
5 whenever you're ready.

6 CRAL ARGUMENT OF J. I. PALMER, JR., ESQ.,

7 ON BEHALF OF PLAINTIFF

8 MR. PALMER: Mr. Chief Justice and may it
9 please the Court:

10 Louisiana and Mississippi once again disagree
11 about the location of our common boundary in the
12 Mississippi River. In this litigation we're concerned
13 with about a four-mile stretch of the river which is
14 situated approximately three and a half miles north of
15 the Natchez, Mississippi, bridge.

16 This case is remarkably similar to the one
17 that you decided in 1966, that being No. 14 Original, in
18 that, while the facts are similar, we also have here an
19 oil well which was drilled in 1972 from the Mississippi
20 side of the river and your decision will in large
21 measure determine, among several issues, in which state
22 this oil well is located.

23 Mississippi has filed exceptions to the report
24 of the Master in this case and they focused on two basic
25 areas: One is the manner in which the Master analyzed

1 the evidence in the case and fashioned his
2 recommendations to you; and the other is the Master's
3 refusal to draw a specific boundary by geodetic
4 coordinates for the entire area in dispute for the time
5 period in dispute, which is essentially 1972 through
6 1982.

7 Now, as the Master's report correctly
8 reflects, Your Honors, Louisiana and Mississippi both
9 recognize that the law of the thalweg controls here.
10 Your landmark decision of Iowa versus Illinois in 1892
11 announced the basic law of the case, and in 1906 when
12 you decided Louisiana versus Mississippi in the first
13 instance you told both states that the law of the
14 thalweg controls.

15 So to that extent we agree on the law. Of
16 course, the thalweg principle has two basic predicates,
17 one being the principles of accretion and avulsion --
18 excuse me, accretion and erosion -- and the other being
19 the principles of avulsion.

20 Now, the Master on page 4 of his report
21 suggests to you both in the text and in footnote number
22 one that this Court now is involved only with the
23 principles of accretion and erosion as they would apply
24 to the so-called live thalweg of the river in this
25 area.

1 QUESTION: Counsel, what page is footnote
2 number one on?

3 MR. PALMER: Page 4, Mr. Justice Rehnquist.

4 You'll see that the Master asserts in that
5 footnote his presumption that all parties agree that
6 only the live thalweg is at issue here and that, he
7 says, that the sole evidence before this Court relates
8 to that live thalweg.

9 We say that is a rather bold and erroneous
10 statement of what's in the record before you. You'll
11 find, first of all, that in Louisiana's complaint, Your
12 Honors, she alleges that the boundary that we're arguing
13 about here was fixed by the law of avulsion as a result
14 of the 1933 Corps of Engineers cut-off of Giles Bend,
15 which is just to the south and constitutes the southern
16 half of this boundary.

17 QUESTION: Well, that's not inconsistent with
18 the thalweg being live, is it?

19 MR. PALMER: Your Honor, we say to the Court
20 that the thalweg or the boundary in this case consists
21 in the upper part of the live thalweg and in the lower
22 part of the so-called dead thalweg in the Giles Bend
23 Cut-Off. The state boundary must be continuous, and in
24 this particular location, Your Honor, the thalweg
25 proceeds on its live course until it hits the upper

1 terminus of the dead thalweg which was caused by the
2 Corps of Engineers cutoff.

3 And that's one of the key contentions of
4 Mississippi here, is that Louisiana not only asserted
5 that the law of avulsion is involved here, but both
6 states throughout trial introduced ample evidence to
7 show the location of the old dead thalweg and also how
8 that has been affected by the westwardly movement of the
9 river.

10 I would call your attention, Your Honor, to
11 the fact that, in addition to the assertions of both
12 states in the pleadings, the very second exhibit which
13 was introduced at trial, which was Joint Exhibit No. 1,
14 is a map depicting several features in 1971. The
15 surface location of the well on the Mississippi side of
16 the river, the bottom location, and the specific
17 coordinates and position of the 1964 dead thalweg is
18 shown on that very exhibit and described by metes and
19 bounds coordinates.

20 Additionally, several exhibits introduced by
21 Louisiana at trial show that 1964 dead thalweg. Now, in
22 questioning by the Master during the course of the
23 trial, the witness at that time said that for the
24 purposes of that present testimony that depiction of the
25 '64 dead thalweg was not then relevant. But counsel for

1 Louisiana was asked about those drawings; he said that
2 they weren't relevant then, but might become so later.

3 QUESTION: Well, Mr. Palmer, on reading
4 footnote one of the Master's report to which you refer,
5 he says: "I take the position of all parties to be that
6 the location of the Louisiana-Mississippi boundary
7 relative to the bottom hole location of the well must be
8 determined by reference to the live thalweg."

9 Now, is that an incorrect statement in your
10 view?

11 MR. PALMER: Your Honor, the implication or
12 the suggestion of the statement is that all we are
13 concerned about is the location of the boundary with
14 respect to that well, and that we say is the fundamental
15 problem here. We're concerned about the location of the
16 boundary throughout the area in dispute.

17 QUESTION: Okay. But is that a correct
18 statement if you don't draw the implication from it that
19 you do, that with respect to the location of the oil
20 well that it's the live thalweg that is going to
21 govern?

22 MR. PALMER: Your Honor, a latitude line drawn
23 through the bottom hole location in an east-west
24 direction would intersect that portion of this boundary
25 which is live. It would not intersect that portion of

1 the boundary which is part of the dead thalweg. So to
2 that extent that is a correct statement.

3 The problem we have, Your Honor, is the
4 suggestion of the footnote, which is consistent with the
5 Master's report to you, that all he wants to do is look
6 at that one point on the boundary. And we say no,
7 because, as I will mention in a moment, the ownership of
8 this well is but one of the results of this case. Now
9 --

10 QUESTION: May I ask, counsel, what is a
11 bottom hole? Is there a top hole?

12 MR. PALMER: Yes, sir, and that top hole is
13 located in the State of Mississippi on the lands of our
14 Co-Defendants, the Dille family. The oil well was
15 drilled deviationally, in an angular fashion, under the
16 river.

17 QUESTION: Sideways?

18 MR. PALMER: Yes, sir. So the bottom hole
19 location is where the plug is at the bottom.

20 So Your Honors, to the extent that --

21 QUESTION: What are the concerns other than
22 the well? I take it that you say the period that you're
23 concerned with ends in 1982, and to the extent the
24 thalweg is live, if you fix the boundary at the end of
25 the period in '82, it would no longer be the boundary

1 anyway, would it?

2 MR. PALMER: It would not be the boundary
3 after 1982.

4 QUESTION: Tell me, what are your concerns
5 other than the location of the well for the period
6 between '70-whatever it is and '82?

7 MR. PALMER: Your Honor, there are several
8 consequences of this case in addition to --

9 QUESTION: That's what I'm asking you.

10 MR. PALMER: -- the oil well ownership. First
11 of all, as we have said, both states have asked that the
12 boundary be drawn, and here are the reasons that we say
13 it's extremely important here.

14 First of all, Louisiana through its own
15 exhibits in evidence has shown that their recommended
16 boundary falls well to the west of the 1964 dead
17 thalweg. Now, that taken to be true, Louisiana herself
18 has proved that she has lost land in that time period
19 and Mississippi has gained land in that time period.
20 Therefore, Mississippi has acquired additional lands
21 over which to assess ad valorem taxes, we have
22 additional lands to exert our police jurisdiction over.

23 Louisiana conversely, having lost some land,
24 has those drilling units, one of which surrounds this
25 oil well, diminished in scope. And if we sit here and

1 let Louisiana continue to claim out to a dead thalweg
2 which she herself proves doesn't exist any more, you're
3 talking about giving a state more land than even she has
4 said she's entitled to.

5 QUESTION: Well, I know, but setting the
6 boundary at the end of '82 wouldn't settle your dispute,
7 would it, because the thalweg isn't there any more.

8 MR. PALMER: It's not there, Your Honor. But
9 let me point out --

10 QUESTION: The boundary has moved. I don't
11 know, which way has it moved? Do you know which way,
12 how it's moved since '82?

13 MR. PALMER: I don't, and that would only be
14 determined through the addition of more testimony. Let
15 me point out something, though, Your Honor. The Master
16 in his suggestions to you as a basis for not drawing
17 that line used your precedent, the old ICC case back in
18 1911 or thereabouts.

19 QUESTION: Well, I'm still interested in your
20 reasons for wanting the -- all of your reasons for
21 wanting the boundary as of '82 fixed all up and down for
22 that four-mile run.

23 MR. PALMER: Okay. There are two more: One,
24 this Court has in the past, and certainly will in the
25 future probably, entertained petitions for the entry of

1 a supplemental decree. In the event that the evidence
2 shows in the future that the boundary has moved
3 radically to the west, then of course Mississippi would
4 come before you and ask for the entry of a supplemental
5 decree.

6 The case would be reopened, additional facts
7 would be presented. Then you would have another
8 determination as of the date of the conclusion of that
9 supplemental hearing. Now, Your Honor, if we're not
10 going to draw a boundary here, then at that later time
11 we start all over again.

12 QUESTION: So long as the thalweg is live, you
13 can't draw a metes and bounds boundary.

14 MR. PALMER: Your Honor, you can draw the
15 metes and bounds boundary for every year for which you
16 have evidence of its location after --

17 QUESTION: Well, what's magic about a calendar
18 year?

19 MR. PALMER: It's magic in the sense that
20 we're determining not only the rights between the
21 states, but you must remember there are private
22 Defendants in this litigation, and to that extent in the
23 lower court, in the action that precipitated this very
24 lawsuit, the Dille family has complained of possible
25 drainage of the oil from their land.

1 Now, that's their private concern. That's not
2 the concern of the state. But Your Honors, unless they
3 can prove where that boundary is in this time frame,
4 they cannot make their drainage case. So they're
5 sitting there, if this Court does not draw the boundary,
6 with a pending case before a lower federal court and
7 they're being told: Okay, prove your boundary -- prove
8 your drainage case. They can't prove it.

9 QUESTION: Well, can't they get a witness to
10 testify as to which side of the property they're
11 claiming the thalweg is then running or is running at
12 the relevant date for that case?

13 MR. PALMER: That is still basically a
14 boundary decision, Your Honor, and Louisiana got this
15 case removed to here because they say this is the only
16 forum for determining that boundary.

17 QUESTION: But no one doubts the boundary is
18 the live thalweg, do they?

19 MR. PALMER: It is live at that one point,
20 Your Honor.

21 QUESTION: Which is the point at which the
22 Dille family is concerned, I would take it.

23 MR. PALMER: Well, that is the one point on
24 their property boundary, Your Honor. But their boundary
25 is commensurate with the Louisiana boundary for the

1 entirety of their ownership. So they get one point on
2 their boundary line, but the rest of their boundary is
3 left indeterminate.

4 What I'm suggesting to you basically as to
5 that question, that if this Court does not draw that
6 boundary and the private Defendants are remanded to the
7 lower court to prove their drainage case and they can't
8 do it, you have the classic situation like the ICC
9 case.

10 QUESTION: Well, why can't they do it? Why
11 can't they do it?

12 MR. PALMER: Because they attempted to do that
13 and Louisiana said: No, you can't do it at the lower
14 federal level.

15 QUESTION: Louisiana can't keep them from
16 going into the lower federal court, can they?

17 MR. PALMER: They did. We're here.

18 QUESTION: Well, I know you're here. But if
19 we don't determine the dispute -- what if we had turned
20 down jurisdiction? What if we hadn't permitted
21 Louisiana to file? What would they -- just on the
22 grounds that the only real issue involved was who owned
23 that oil well and that was a private matter,
24 essentially.

25 MR. PALMER: Which is exactly what we argued

1 in our motion in opposition.

2 QUESTION: That may be, but suppose we had
3 turned it down?

4 MR. PALMER: They would have had to go forward
5 or be out of court.

6 QUESTION: Well, they certainly could have
7 gone forward with proof.

8 MR. PALMER: Yes, sir.

9 QUESTION: Well --

10 MR. PALMER: Of course, this Court had that
11 very same question posed to you in No. 92 Original,
12 Arkansas versus Mississippi, when Arkansas was on the
13 courthouse doorsteps going to trial and backed up and
14 said: Wait a minute, that's not the right forum to
15 determine a boundary dispute. And you entertained their
16 motion for leave to file. They did file suit.

17 The Master suggests that if this oil well
18 weren't involved in this suit you wouldn't have let
19 anybody do it. But it's already happened in No. 92.

20 QUESTION: Well, if we reject your exceptions
21 to the Master's report and accept his report, I take it
22 the location of the bottom hole of this well is fixed,
23 has been determined. But it certainly wouldn't
24 determine the boundary the rest of the way, and I don't
25 know -- I don't know what barrier there would be to the

1 private owners in a lower federal court to have that
2 boundary litigated --

3 MR. PALMER: Your Honor, the only problem --

4 QUESTION: -- if they really have a live
5 question about it.

6 MR. PALMER: Your Honor, the only problem with
7 that is that the owner on the Mississippi side is the
8 Dille family. The owner on the Louisiana side is the
9 State of Louisiana. Now, if they will concede to try
10 their boundary case in a lower federal court against a
11 citizen of another state, okay. But they wouldn't do
12 that here, so they removed it to this Court.

13 This is an unusual case in which the state
14 owns riparian lands.

15 QUESTION: There isn't exclusive jurisdiction,
16 is there, in this Court just because a state is a
17 party?

18 MR. PALMER: No, sir, and we suggested to you
19 originally not to grant leave for that very reason.

20 QUESTION: I understand, I understand that, I
21 understand that.

22 MR. PALMER: Your Honor, we simply say that,
23 since the Court has taken the case, we've tried it, the
24 evidence is before the Court, the Master has labored
25 diligently with several thousand words to describe one

1 picture, why not just have him put his line on those
2 hydrographs?

3 A suggestion has been made by the Master even
4 before today that, as in the last Louisiana case, No.
5 14, that someone should be able to just read the report
6 and determine from his reading where the boundary is.
7 Unfortunately, in that latter case, Your Honors, if
8 you'll refer to the Master's report you'll see there
9 were no hydrographs in that case for any of the years in
10 dispute.

11 QUESTION: Well, if the thalweg is migrating,
12 you can't get an accurate description of the boundary
13 from the time it takes the surveyors to go out and see
14 where the thalweg is on January 15th until the time they
15 can come and testify before the Master on February 1st.
16 The boundary may be different between January 15th and
17 February 1st.

18 MR. PALMER: Correct. Your Honor, we are
19 arguing about '72 to '82, not anything after '82. We're
20 saying that there are material consequences of this
21 determination for that time period, regardless of what
22 happens --

23 QUESTION: Are you suggesting that there was
24 only one metes and bounds description of the boundary
25 between 1972 and 1982?

1 MR. PALMER: We're suggesting that there is a
2 metes and bounds description for every year for which
3 there is proof upon which a boundary could be
4 determined.

5 QUESTION: There may be a metes and bounds
6 description for every week that would vary from week to
7 week. Do you want the Master to go week by week at it
8 over ten years?

9 MR. PALMER: Your Honor, we have asked that
10 you do what the Master did in No. 14 and simply have him
11 draw it for every year. That was done there. Your own
12 decree recites the metes and bounds description of the
13 state boundary for about a ten-year period at the end of
14 the case.

15 So to that extent we have the same thing, and
16 yet the Court is being asked to depart from all of that
17 and to do what you've never done before and have a
18 boundary case in which you don't determine a boundary,
19 you just determine one point on it and say, well, this
20 is -- Louisiana owns the oil well, forget about it and
21 go home.

22 Now, it would be like in 92 Original, Arkansas
23 versus Mississippi, just telling Arkansas: Well, you
24 don't own this little piece of land, but we're not going
25 to draw the boundary, so forget about it. We say there

1 are other consequences besides that.

2 Of course, we have spent the bulk of those
3 exceptions, Your Honors, as you have seen, developing
4 our factual contentions.

5 QUESTION: Well, what if the Master, to get
6 back to that, gave you a metes and bounds description of
7 the dead part of the thalweg and then, with respect to
8 the part of the boundary that was covered by a live
9 thalweg, simply described what a thalweg is, the deepest
10 point of the channel and so forth, and gave no metes and
11 bounds. Would that satisfy you?

12 MR. PALMER: Your Honor, in Nebraska versus
13 Iowa this Court plainly said that when you're talking
14 about a boundary and the law of avulsion, which is what
15 you're talking about with that dead thalweg, that that
16 thalweg remains fixed unless and until the river comes
17 back and reoccupies it. And we've shown that this has
18 happened in this case.

19 QUESTION: Okay. But I say if the Master had
20 given you a metes and bounds description of the dead
21 part of the thalweg and then had gone on to say that
22 above that, if it is above that, the boundary is the
23 live thalweg from point so and so, whatever it is,
24 latitude to point so and so latitude, so that you could
25 figure out what part of the river was covered by the

1 live thalweg, would that satisfy you?

2 MR. PALMER: Well, it would be better than
3 what's recommended, to the extent that we at least have
4 a portrayal of the southern part of those drilling units
5 on the Louisiana side. But you then still leave a
6 floating line north of that point, Your Honor.

7 If the Master is going to determine the point
8 of intersection of the dead and the live thalwegs and
9 another point on the live boundary, we still don't see
10 the great difficulty in his going ahead and just simply
11 drawing his line that he described to you in the book
12 and having some competent surveyor go pick the
13 coordinates off of it.

14 The difficulty is just not there. We just
15 don't understand --

16 QUESTION: Well, but the utility isn't there,
17 either, because the line could change next week.

18 MR. PALMER: It could. I go back again to
19 what this Court has done before in these types of cases
20 in which you have a completed time span for the
21 controversy. You still have not refused to give the
22 states the portrayal of the boundary that was in issue.

23 QUESTION: Well, what dispute? Just tell me
24 more concretely, what dispute is there between you and
25 the State of Louisiana any time from '72 to '82 about

1 anything except the location of the bottom hole of this
2 well? Just give me a concrete example, what kind of a
3 claim is there between the two states?

4 MR. PALMER: There is no claim as between the
5 two states except as they bear directly on taxation of
6 those --

7 QUESTION: Well, just give me an example. Are
8 you trying to tax something that Louisiana says you
9 can't during those ten years?

10 MR. PALMER: There's been no claim made of
11 that.

12 QUESTION: Well, what other kind of a concrete
13 claim is there between you and Louisiana during those
14 ten years? Just give me a concrete example. Or what
15 could be a dispute between you and Louisiana during
16 those ten years?

17 MR. PALMER: Okay. I think the basic
18 contention would be, Your Honor, where the jurisdictions
19 of the two states go --

20 QUESTION: Well, what difference does it make
21 for those ten years?

22 MR. PALMER: Well, as I mentioned a minute
23 ago, it certainly would affect our exercise of police
24 power. For instance --

25 QUESTION: Well, all that's all gone now.

1 You're not going to be exercising any police power now
2 relating to those ten years.

3 MR. PALMER: Well, Your Honor, if the State of
4 Mississippi were to do today what it has not done and
5 establish drilling units on the Mississippi side of that
6 boundary, then where do we draw the line? Do we draw it
7 consistent with the Louisiana 1964 line or do we say,
8 no, the Master describes a certain indefinite line out
9 in the river, so we're going to use that as the western
10 terminus of our drilling units?

11 You're going to have an obvious overlap,
12 because there will be no fixing of the boundary. All
13 those leases which are attached to the complaint show
14 the --

15 QUESTION: Well, you keep saying "if". Have
16 you done something like that?

17 MR. PALMER: No, Your Honor.

18 QUESTION: I think if you had come in to the
19 Special Master and said, look, there's something else
20 besides this well that we're in dispute on, we're about
21 to establish these drilling units here and Louisiana
22 says that they're on their side, I'm sure he would have
23 solved that concrete dispute.

24 You haven't told me yet what kind of a
25 concrete dispute there is between you and Louisiana,

1 other than this particular well.

2 MR. PALMER: Your Honor, my point has been
3 that in the past this Court has not required some major
4 controversy over and beyond the states' sovereignty over
5 these lands as a predicate for granting leave to
6 determine a boundary. You certainly haven't done it in
7 the past, and after this case was filed again you didn't
8 require that in 92.

9 QUESTION: Well, that may be so. But you
10 think just because two states want their boundary
11 determined as of any particular -- say that they come in
12 and say, we just want our boundary fixed as of the time
13 the evidence is closed, as of that very time; that you
14 have the sovereign right to have that boundary fixed?

15 MR. PALMER: That certainly has --

16 QUESTION: No matter what.

17 MR. PALMER: That certainly has been what you
18 have done in the past, Your Honor.

19 QUESTION: Well, that may be true.

20 MR. PALMER: And if the Court wants to depart
21 from that, so be it.

22 QUESTION: But you would say really that you
23 can have a Special Master and use this Court's original
24 jurisdiction basically in the capacity of a surveyor;
25 that both parties can agree that the thalweg of the

1 Mississippi River is the boundary, there's no argument
2 about accretion versus avulsion or that, you know, that
3 there was an oxbow cutoff or something like that, but
4 that nonetheless the Master is employed simply to plot
5 the position of a live thalweg as of say January 15th,
6 1982, around the Natchez Bridge?

7 Now, I'm not suggesting that's a ridiculous
8 condition. Maybe you're right, that we've done it in
9 the past.

10 MR. PALMER: I think the Court is going to
11 require that the states with some definition describe
12 this disputed area in terms of miles or land size or
13 whatever. But I'm just saying that in the past there
14 has been no more predicate other than to say, we don't
15 agree where our boundary is, we want this Court to use
16 its original jurisdiction to fix it, and let the chips
17 fall where they may.

18 That's what has been done before. We're
19 asking you to do that now, and yet we're getting into a
20 flip-flop situation where the Master is saying: Forget
21 about all that; we'll just tell you where the bottom
22 hole is and you don't worry about the location of your
23 boundary.

24 We say the consequences are far too great just
25 to go off on that, particularly when you've got it all

1 done before you, the evidence is all in. And on the
2 form of the evidence, I'm not going to belabor in great
3 detail what we have set out in detail in our report to
4 you.

5 QUESTION: Mr. Palmer, just as a practical
6 matter, how much -- forgetting avulsion for the moment,
7 because then a boundary can really change rapidly. But
8 if it's just a matter of erosion and accretion, in a
9 year how much, over those ten years how much in your
10 judgment did the river ever change in a year? At any
11 point, how much east and west did the boundary change in
12 a year?

13 MR. PALMER: As I recall, from bits of the
14 testimony, Your Honor, in one or two years the
15 Mississippi witness contended the boundary moved as much
16 as 200 feet or thereabouts. I think the record will
17 substantiate that there was movement of at least that
18 much.

19 QUESTION: But that's probably the maximum
20 that it's ever moved, that it's moved at any point in
21 any year?

22 MR. PALMER: I wouldn't say that that's the
23 maximum. I know that historically there have been
24 movements of the banks of over 2,000 feet a year.
25 That's from my personal knowledge. And that was

1 testified to in this case about the massive movement --

2 QUESTION: That may not have much to do with
3 the thalweg?

4 MR. PALMER: It may well not, but to suspect
5 that that time of movement of the top bank would cause
6 no movement of the thalweg we think is unreasonable.

7 QUESTION: Yes.

8 MR. PALMER: But to the point of the basic
9 evidentiary problems here, the thalweg doctrine is based
10 on navigation. The rule there is where does downstream
11 traffic go. We're talking about quarter mile long tcws,
12 not rowboats and sailboats, and that's why I think the
13 Master's conclusions are erroneous in light of the
14 evidence, and particularly in light of the experience of
15 the witnesses that testified.

16 CHIEF JUSTICE BURGER: Mr. Kimmel.

17 ORAL ARGUMENT OF DAVID C. KIMMEL, ESQ.

18 ON BEHALF OF DEFENDANTS

19 MR. KIMMEL: Mr. Chief Justice and may it
20 please the Court:

21 Louisiana and Mississippi have been litigating
22 this case some three years and we've agreed on a lot
23 that has transpired in this case. The two states as
24 well as Mr. Dille, the riparian landowner, have agreed
25 on the bottom hole location. We all know where that is

1 on a particular map.

2 We have agreed on the law that applies to this
3 particular case. And the two states as well as Mr.
4 Dille have also agreed on most of the documents that
5 have been introduced. Hydrographic surveys are
6 identical for both states.

7 The only evidentiary issue is the
8 interpretation of those particular documents by the
9 experts. Mississippi --

10 QUESTION: In terms of where the thalweg is.

11 MR. KIMMEL: In terms of where the thalweg is,
12 the live thalweg. And that was the week-long case and
13 the basis of it.

14 Mississippi's witness, Mr. Austin Smith, his
15 analysis of those particular documents was completely
16 disregarded by the Special Master, and there are various
17 reasons for that.

18 QUESTION: You mean rejected.

19 MR. KIMMEL: Rejected, Your Honor, rejected.

20 QUESTION: I mean, he didn't --

21 MR. KIMMEL: He considered them.

22 QUESTION: He considered them.

23 MR. KIMMEL: That's right.

24 Mr. Austin Smith did not use or utilize any
25 navigational aids whatsoever, including the lights that

1 a mariner would use to negotiate this particular bend.
2 Mr. Austin Smith did not utilize the buoys that are
3 placed in the river in this particular point by the
4 Coast Guard. As a matter of fact, in 1976 he would have
5 his particular vessel running over the buoys, which was
6 brought out in the Special Master's report.

7 Mr. Smith disregarded a developing point bar
8 -- and a point bar is a land mass underneath the water
9 which makes a very shallow area -- on the Louisiana side
10 directly in proximity to the bottom hole location. This
11 would tend to throw the river traffic over toward
12 Mississippi, which is what the Special Master found.

13 QUESTION: Mr. Kimmel, there is discussion in
14 the testimony about breaking down the tow. Would you
15 tell us what that term means --

16 MR. KIMMEL: Yes, Your Honor.

17 QUESTION: -- and how it's relevant?

18 MR. KIMMEL: Breaking down a tow as you come
19 through a bend means that you are to point your tow
20 downstream. As you come through the bend, a mariner
21 will see lights, and just above the bottom hole is the
22 Port Gibson light. That is referred to in the trade as
23 a passing light.

24 We introduced, Louisiana did, into the record
25 channel reports which were put out by the U.S. Coast

1 Guard every week from soundings taken every day, a
2 recommended navigation course through this bend. What
3 did the channel reports say? When you hit that passing
4 light it will be on your right; maintain 200 yards off
5 of that passing light. That is the recommended course
6 that the U.S. Coast Guard tells the mariners to travel.

7 QUESTION: Does the Coast Guard speak in terms
8 of right and left on those occasions?

9 MR. KIMMEL: No. I'm afraid that's the layman
10 in me, Your Honor, saying that. It's kept on the
11 starboard.

12 Once past that particular light, the Coast
13 Guard directs the mariners to shoot for Giles Bend
14 Cut-Off light, which is on the Mississippi side, and
15 that is referred to in the trade as a crossing light.
16 What does the Coast Guard tell the mariner to do at that
17 point? Position himself in some years 200 yards, in
18 some years 300 yards, off of that particular light.

19 Once there, he is to break down and go towards
20 the next light, which will then be on the Louisiana
21 side, and that is the Cowpen Island light. He uses that
22 as a passing light and he continues down the river.

23 That is the Coast Guard recommended sailing
24 line through this particular bend. And "breaking down",
25 Your Honor, means to point your tow downstream.

1 Now, Mr. Smith disregarded these channel
2 reports. They were not introduced. He had a problem
3 with locking in, and once his particular thalweg was
4 locked in I'm assuming it would run up on the shore and
5 he would still say that's the way it would have to go.

6 It was surprising the way he treated the
7 channel buoys, especially in '76, where he would have
8 his vessel run over these buoys. He says they were off
9 course, but it doesn't make any sense only because they
10 would not be charted off course, and they show up on the
11 hydrographic surveys.

12 Now, as far as Louisiana's witnesses are
13 concerned, Mr. Hatley Harrison used his analysis of the
14 hydrographic surveys, he used his analysis of the
15 channel reports, he used his analysis of the flood
16 control and navigation map number 38, which is put out
17 by the Mississippi River Commission. And he took
18 particular note of the navigational aids in order to
19 determine his particular thalweg, which was accepted by
20 the Special Master.

21 QUESTION: Now, Mr. Kimmel, you say "his
22 particular thalweg". Do you think the evidence is in
23 the record sufficient to actually determine the boundary
24 up and down the river for each year?

25 MR. KIMMEL: I do, Your Honor. As far as Mr.

1 Harrison's exhibits in the record, you could actually
2 determine a boundary. But --

3 QUESTION: For each year?

4 MR. KIMMEL: For each year.

5 QUESTION: Not only '82, but for each year.

6 MR. KIMMEL: For '72 to '82.

7 But Your Honor, let me address that for just a
8 second. My point is why. This area is a live thalweg.
9 You put a line on a piece of paper today; tomorrow it's
10 gone. We can go back to 1972, sure, and draw a
11 particular boundary. The day after, that 1972 boundary
12 that's been drawn by this Court is gone.

13 QUESTION: But if the thalweg's been moving
14 west during these ten years, or at least if in part of
15 this stretch it's been moving west, Louisiana's been
16 losing land to Mississippi, and you may not know how
17 much.

18 If you set the boundary in '82, June 1, '82,
19 the thalweg probably isn't there any more. But if it's
20 been moving west, you've been losing some more land.

21 MR. KIMMEL: That's quite possible, Your
22 Honor.

23 QUESTION: But at least you would know, if you
24 fixed the boundary in '82, at least you'd know as of
25 that date what land Mississippi could tax as compared to

1 Louisiana.

2 MR. KIMMEL: Yes, I would have to agree with
3 that, Your Honor.

4 QUESTION: If so, why shouldn't -- I would
5 think you can never keep up with this problem, but at
6 least you can chase it.

7 MR. KIMMEL: Louisiana's been chasing these
8 particular problems for many years, Your Honor. And
9 Louisiana --

10 QUESTION: So has Mississippi.

11 MR. KIMMEL: So has Mississippi. And we find
12 ourselves in the position of really, if the Special
13 Master is required by the Court to put a pencil to the
14 paper and draw a boundary, Louisiana really has no
15 objection to that. We understand what the problem is
16 when one tries to draw a boundary which is completely
17 ambulatory. We understand that problem.

18 Most of the cases, if not all of them, deal
19 with the dead thalweg issue, where you can set a
20 boundary on a piece of paper and it's going to stay. In
21 this case we don't have that at all for any year and we
22 won't have it for the future, because that boundary is
23 going to move.

24 But I would have to agree with Your Honor that
25 in 1982 if we actually were to draw a boundary we would

1 then know approximately --

2 QUESTION: Well, if you drew it you'd probably
3 know, at least on some stretches of the river, there'd
4 be some land, there'd be some land in Mississippi that
5 wasn't there in 1960.

6 MR. KIMMEL: Yes, sir, that's possibly
7 correct.

8 QUESTION: Well, you know it's correct.

9 MR. KIMMEL: Yes.

10 QUESTION: And I don't know -- I would think
11 it would be -- it might be helpful.

12 MR. KIMMEL: The only real issue in this case
13 -- and I doubt whether suit would have ever been filed
14 had it not been for the ownership of this particular
15 bottom hole of this well. In this particular area
16 Mississippi and Louisiana have gotten along fine. We
17 haven't had any boundary problems.

18 This suit came about -- the genesis of this
19 suit was ownership.

20 QUESTION: Just because it hasn't made much
21 difference where the boundary is.

22 MR. KIMMEL: That's right.

23 But the ownership of the well is the
24 underlying issue and, as the Special Master determined,
25 since he finds that the thalweg has not moved to such an

1 extent to place the well in Mississippi, in his opinion
2 it's a vain and useless act to go back and draw the
3 boundaries.

4 QUESTION: But that's treating this as if it
5 were a quiet title action and you simply rule, in this
6 case rule for the Plaintiff or rule for the Defendant
7 and, you know, say that's all I need to decide, because
8 you're talking about who owns this land and I've now
9 decided that, whereas perhaps the concept of original
10 jurisdiction is a broader thing, that you ought to do
11 something by way of deciding the actual location of the
12 boundary line.

13 MR. KIMMEL: To which we agree, Your Honor.
14 Louisiana again finds itself in a position of, if we
15 actually have a boundary drawn on a piece of paper, we
16 have no literal objection to that. Frankly, when we
17 originally filed suit we sued as a boundary action.

18 QUESTION: Yes, you certainly did. You're the
19 one who wanted the boundary.

20 MR. KIMMEL: Understanding, of course, that
21 the live thalweg, the problems incidental in
22 establishing --

23 QUESTION: Well, Mr. Kimmel, would there have
24 to be more evidence taken to draw a boundary?

25 MR. KIMMEL: No, sir. No, sir, absolutely

1 not.

2 QUESTION: And what kind of a skill would it
3 take to look at these hydrographs and draw that
4 boundary?

5 MR. KIMMEL: It would just take an engineer or
6 a surveyor in plotting a particular line on a map.

7 QUESTION: Depending on what expert you
8 believed.

9 MR. KIMMEL: That's right, or depending --

10 QUESTION: If the Master says, look, believe
11 this expert and don't believe that one --

12 MR. KIMMEL: That's right.

13 QUESTION: -- he could draw it?

14 MR. KIMMEL: That's right. It can be drawn.
15 It can be done and it can be accomplished.

16 QUESTION: Is your typical hydrograph in
17 evidence dated?

18 MR. KIMMEL: Yes, sir, the hydrographic
19 surveys are dated, yes, sir, for each individual year.

20 QUESTION: So then the Master could
21 presumably, taking the relevant sets of hydrographic --
22 of hydrographs of a given date, the ones which he
23 credited, could as of that date determine what the metes
24 and bounds of the thalweg was?

25 MR. KIMMEL: Yes, sir, that's correct, that is

1 correct.

2 QUESTION: Well, the hydrographs are the same
3 for both sides, aren't they?

4 MR. KIMMEL: Yes, sir, the hydrographs --

5 QUESTION: It's just a question of an expert
6 interpretation of those hydrographs, and the Master has
7 indicated which expert he believes.

8 MR. KIMMEL: Experts, yes, sir.

9 QUESTION: Experts.

10 MR. KIMMEL: Yes.

11 QUESTION: He believed yours.

12 MR. KIMMEL: Right, that's correct.

13 QUESTION: So I guess you wouldn't object to
14 having it drawn.

15 MR. KIMMEL: We're not putting up a strong
16 argument over that.

17 QUESTION: Mr. Kimmel, does the live thalweg
18 have to connect with the dead thalweg at each end?

19 MR. KIMMEL: In my opinion it does not, Your
20 Honor.

21 QUESTION: Do both parties agree, then, on
22 that --

23 MR. KIMMEL: No, ma'am.

24 QUESTION: -- or is that an outstanding legal
25 issue?

1 MR. KIMMEL: If there's a legal issue involved
2 in that, I don't know what it is, because the boundary
3 -- in my opinion the boundary does not have to connect.
4 Mississippi asserts that the boundary needs to be
5 continuous, but if that were the case then this live
6 thalweg would have to go all the way up to the beginning
7 of the state of Mississippi and Louisiana in the river.

8 We don't have a continuous boundary with
9 Mississippi in the river that's ever been determined.

10 QUESTION: Well then, maybe you're wrong in
11 thinking that the lower thalweg is dead.

12 MR. KIMMEL: No, sir, the lower thalweg is
13 dead as a result of a cutoff. This is a cutoff, Your
14 Honor, and what has happened is the cutoff area dries up
15 and forms a dead thalweg. It can be determined by
16 engineers, and once that's been done that is set.

17 QUESTION: Well, if the Act admitting
18 Mississippi to the Union provides that the boundary
19 shall be such and such, or the Act admitting Louisiana,
20 I dare say neither of those acts contemplated an
21 interrupted boundary.

22 MR. KIMMEL: No, sir, they did not contemplate
23 --

24 QUESTION: Then how could it subsequently have
25 become interrupted, given the law of avulsion and

1 accretion?

2 MR. KIMMEL: It is not technically
3 interrupted, Your Honor. It's just that it has not been
4 determined. As I mentioned, Louisiana and Mississippi
5 have a common boundary, the main navigational channel,
6 throughout the entire stretch of the Mississippi River.
7 But it has not been determined.

8 The two states have talked about this for 50
9 years and we've tried to get together to determine a
10 boundary and put it to a piece of paper, and it just
11 can't be done.

12 QUESTION: But a minute ago you said you
13 thought the boundary didn't have to be continuous.

14 MR. KIMMEL: It does not.

15 QUESTION: It can't be if --

16 MR. KIMMEL: Well, it does not have to be
17 determined. It need to be continuous. It needs to be
18 continuous in the sense that you can't have a piece of
19 boundary that has disappeared.

20 QUESTION: No.

21 MR. KIMMEL: That's true. But it does not
22 need to be determined.

23 In this case that issue, the connection of
24 that boundary to the dead thalweg, is really irrelevant
25 because all that needs to be determined is the boundary

1 in the vicinity of the well.

2 QUESTION: Well, is that all that Louisiana
3 prayed for in its complaint?

4 MR. KIMMEL: Yes, sir. We asked for a
5 boundary to be determined in that particular area,
6 disputed area. We did also include an allegation
7 concerning the 1964 thalweg, and the reason we did that
8 was because when we filed the suit we were not sure
9 whether or not that 1964 dead thalweg would be an issue
10 in the case. As it turned out through discovery and
11 depositions, that particular thalweg was not an issue in
12 the case and the entire case can be disposed of by the
13 determination of a live boundary in the vicinity of the
14 well.

15 QUESTION: Well, Mr. Kimmel, isn't
16 discontinuous boundary, isn't that problem just inherent
17 in the concept of avulsion on the one hand --

18 MR. KIMMEL: Yes, Your Honor, it is.

19 QUESTION: -- and erosion and accretion on the
20 other?

21 MR. KIMMEL: Yes, sir. Yes, sir.

22 QUESTION: Because when there's an avulsion,
23 if you say, if the law is the line is fixed, then the
24 river's running someplace else.

25 MR. KIMMEL: Yes, sir, that's correct. The

1 river has sinuosity throughout this particular area that
2 has driven both states crazy at times as it snakes
3 around the Delta. That's a problem, that's correct,
4 sir.

5 QUESTION: Well, is there enough evidence that
6 would permit the Master without taking any more to
7 connect the live thalweg with the dead?

8 MR. KIMMEL: No, Your Honor, there is not.
9 There is not.

10 QUESTION: There is only enough evidence to
11 permit the drawing of the thalweg as of given dates in
12 time within a range of the live thalweg?

13 MR. KIMMEL: Yes, Your Honor, that's correct.
14 And Louisiana submits that's the issue in the case. The
15 connection to the dead thalweg is not an issue in the
16 case, is our submission.

17 QUESTION: The states must have had some
18 experience with this in the past, on avulsions and
19 accretions, and where the dead thalweg ends and the live
20 thalweg begins. I would always -- I would think that
21 would be not a new problem.

22 MR. KIMMEL: It's not -- Your Honor, it is not
23 a new problem, especially for Louisiana. Now, I don't
24 know, Mississippi law may be different than Louisiana's
25 --

1 QUESTION: Mr. Kimmel go ahead and finish your
2 answer.

3 MR. KIMMEL: But it is not a new problem and
4 the state is familiar with the dead thalweg issues. Our
5 only point is, in this particular case for the Court to
6 dispose of this case and accept the Special Master's
7 report the connection of the live thalweg to the dead
8 thalweg is totally irrelevant in this case.

9 QUESTION: Well, Mr. Kimmel, does the concept
10 of a discontinuous boundary, which apparently makes
11 sense to my brother Justice White, make any sense to
12 you?

13 MR. KIMMEL: The only way it makes sense, Your
14 Honor, is that in order -- to connect to the 1964
15 thalweg is just not necessary. All this Court needs to
16 do is to determine the live thalweg in the vicinity of
17 that particular well. There is no reason -- the states
18 of Louisiana and Mississippi are not fighting over any
19 connection between the live thalweg and the dead thalweg
20 of this river. There was no real testimony taken in
21 that regard.

22 And all the two states tried for a week was
23 the live thalweg issue and the bottom hole, and that
24 basically is Louisiana's contentions, that a boundary
25 would be a vain and useless thing for the Court to draw,

1 and also that the Special Master's report, his
2 acceptance of Hatley Harrison's testimony, as well as
3 Mr. Leo Odom's testimony and his determination that the
4 bottom hole of this well has remained in Louisiana for
5 all the years in dispute, be accepted by this Court.

6 CHIEF JUSTICE BURGER: Do you have anything
7 further, Mr. Palmer?

8 REBUTTAL ARGUMENT OF J.I. PALMER, JR., ESQ.

9 ON BEHALF OF PLAINTIFF

10 MR. PALMER: Yes, Your Honor, several points
11 that the Court very perceptively raised just a moment
12 ago. First of all, regarding the connection between the
13 live and the dead thalweg. I addressed that initially
14 and pointed out to the Court, in response to your
15 question, Justice O'Connor, there is indeed ample
16 evidence in this record of where that dead thalweg is.

17 It is described by metes and bounds
18 coordinates on the very second exhibit that was even
19 introduced at trial. Mr. Austin Smith, the expert for
20 Mississippi, described in detail how a continuous state
21 boundary, which must not have a hiatus, is connected
22 between live and dead thalwegs, and the exhibits are
23 there for this Court to use.

24 QUESTION: But the connection between the live
25 and the dead I would think in many occasions couldn't

1 possibly be completely in the river.

2 MR. PALMER: Your Honor, the upper terminus of
3 a dead thalweg is fixed at a point in time, generally,
4 according to the rules of this Court, when there is no
5 flow in that dead channel. At that point it's fixed
6 geodetically.

7 QUESTION: Right.

8 MR. PALMER: Now, there is an accepted
9 engineering technique for connecting that upper terminus
10 to the migrating live terminus. That's fully discussed
11 in the record by Mr. Smith. You draw a perpendicular
12 line from the live thalweg to the upper terminus of the
13 dead.

14 QUESTION: Right.

15 MR. PALMER: That was done here in this case.
16 It's even shown in the Louisiana --

17 QUESTION: That's by your witness?

18 MR. PALMER: It was discussed by our witness.
19 But Your Honor, the very exhibits to Louisiana's
20 complaint show the pictorial of their drilling units,
21 and they're key to the dead thalweg. It's there in
22 black and white.

23 QUESTION: Unless you've got your dead thalweg
24 in a concrete-lined canal, the point at which the live
25 thalweg goes into the dead thalweg is going to migrate,

1 too, is it not?

2 MR. PALMER: The point of connection between
3 the live and the dead is going to be fixed. But the
4 connection between the live thalweg and that
5 perpendicular line connecting it to the dead will
6 migrate, Your Honor.

7 QUESTION: Yes.

8 MR. PALMER: That's the way it's done.

9 QUESTION: And so part of that perpendicular
10 line is going to be -- may very well be going over dry
11 land.

12 MR. PALMER: It could, but that would be
13 highly unlikely, Your Honor.

14 Quickly, the --

15 QUESTION: May I ask you one question?

16 MR. PALMER: Yes, Your Honor.

17 QUESTION: Your client, of course, was the
18 Defendant in the case.

19 MR. PALMER: I beg your pardon?

20 QUESTION: Your client, the State of
21 Mississippi, was the Defendant in the case.

22 MR. PALMER: Yes, sir.

23 QUESTION: Did you file any kind of a
24 counterclaim or prayer for any kind of relief,
25 affirmative relief?

1 MR. PALMER: We did not, Your Honor. We set
2 up our defenses as affirmative defenses and did not file
3 a counterclaim in this case, as we did in No. 92.

4 QUESTION: Did your affirmative defenses pray
5 for a declaration of the boundary?

6 MR. PALMER: Yes, sir. Yes, sir.

7 Now, the contentions of our expert witness,
8 we've set those out in our exceptions and the bottom
9 line is this: We put on a witness who has now spent
10 over 50 years of work in that river, over 40 of which
11 was in the federal service with the U.S. Corps of
12 Engineers, 10 of which was as Chief of the Navigation
13 and Mapping Branch of the Corps of Engineers Mississippi
14 River Commission.

15 To assert in the face of a 450-page record --
16 and I won't cite all the times he did discuss it -- that
17 he didn't use navigational aids is ludicrous. And
18 second, if you'll just look at the October 1976 and the
19 May 1977 hydrographs, you'll see why the line was
20 deliberately drawn through some off-station buoys. The
21 '77 hydrograph shows the proper location of those buoys
22 and Louisiana's own expert witness drew his so-called
23 geological thalweg, which is through the deepest part of
24 the channels, right through those same buoys. You don't
25 put a shallow water buoy in deep water. They're off

1 station and the witness testified to that.

2 Mr. Justice Rehnquist, you're absolutely
3 right, if this Court does not draw a boundary you have
4 no more than a quiet title action.

5 QUESTION: Well, let me ask you. If you're
6 connecting, say, the north end of the dead thalweg here
7 with the southern end of the live thalweg in the area in
8 dispute, you say the lines are there, but connecting
9 those two points would not be in the current live
10 thalweg?

11 MR. PALMER: That's correct, because by
12 definition the terminus of the southern end would be the
13 live thalweg.

14 QUESTION: Exactly. And it has migrated.

15 MR. PALMER: Yes, sir.

16 QUESTION: And so you have -- the boundary
17 line would be traversing a section of the stream that
18 wouldn't be in the live thalweg.

19 MR. PALMER: That's correct, and that's why,
20 as was testified to at trial, the accepted technique is
21 to draw the perpendicular line through the live
22 thalweg.

23 QUESTION: Perpendicular?

24 MR. PALMER: Because on equitable principles

25 --

1 QUESTION: You mean just perpendicular to the
2 banks there or east and west?

3 MR. PALMER: Perpendicular to the live
4 thalweg.

5 QUESTION: I see.

6 MR. PALMER: As Mr. Smith testified --

7 QUESTION: So if the live thalweg happens to
8 be running, at that point be running east and west, you
9 draw it north and south?

10 MR. PALMER: It depends on where the upper end
11 of the dead thalweg is, but you could, yes, sir.

12 QUESTION: Okay.

13 MR. PALMER: The point is that if you didn't
14 draw it perpendicularly you would be unfairly favoring
15 one state or the other.

16 QUESTION: Yes.

17 MR. PALMER: The standard of review in this
18 case, as the Court well knows, is de novo.

19 CHIEF JUSTICE BURGER: Thank you, gentlemen.
20 The case is submitted.

21 (Whereupon, at 10:49 a.m., oral argument in
22 the above-entitled matter was submitted.)

23 * * *

24

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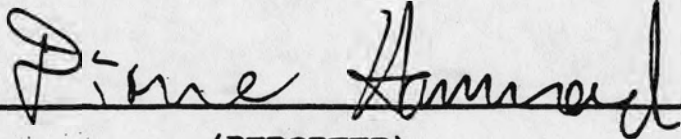
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BY

A handwritten signature in cursive script, appearing to read "Pina Amador", is written over a horizontal line.

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